IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5498 of 1999
SPECIAL CIVIL APPLICATION No 5743 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT RAJYA DAIRY KARMACHARISABHA
Versus
MANAGING DIRECTOR

Appearance:

MR PM THAKKAR, Ld.Sr.Counsel and Ms.SANGEETA PAHWA for Petitioner In SCA No.5498/99

MR BM MANGUKIYA, Ld.Adv. for petitioner in SCA No.5743/99

MR SN SHELAT, Ld. ADVOCATE GENERAL alongwith MR.A.D.OZA, Ld.Govt.Pleader, MR.H.C.PATEL & MRS.Parekh, ld.AGP for the Respondents No.2 & 3 -State.

MR KM PATEL & MR DEEPAK PATEL for Respondent No.1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 03/05/2001

C.A.V. JUDGEMENT

1. Gujarat Rajya Dairy Karmachari Sabha - petitioner has filed this petition under Articles 226 and 227 of the Constitution of India, and has challenged the Circular dated 8.7.1999 passed by Gujarat Dairy Development Corporation Limited (hereinafter referred to as `Corporation') in which Corporation has framed the changed/modified policy regarding voluntary retirement of their employees. The petitioner has challenged the said Circular as being illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India.

2. The facts giving rise to this petition are as under:

2.1 Petitioner is a Union registered under the provisions of the Trade Union Act. The respondent No.1-Corporation is a Company registered under the provisions of the Companies Act, 1956. The respondent No.1-Corporation is a Government Company fully owned and controlled by the Government. The petitioner submitted that, as per the Memorandum & Articles of Association of the Company, all the shares of the company are subscribed by the State Government and powers of appointment of the Board of Directors vest in the Hon'ble Governor of Gujarat. The petitioner submitted that the activities of Corporation is developmental and promotional in nature and the respondents No.2 and 3 are the State of Gujarat.

2.2 In the petition, it was submitted that State of Gujarat-respondent no.2 has decided to restructure the public sector undertakings, and in pursuance to that decision, the respondent no.2 - Government has framed one Voluntary Retirement Scheme under the program by Circular dated 27.11.1997. The said voluntary retirement scheme provided following two options:

(i) to be relieved from the services after taking Voluntary Retirement.

(ii) to be considered as surplus and included in the list of surplus employee in the surplus employee cell constituted by the Government for the purpose of giving alternative employees to the surplus staff.

(iii) It was further decided that the Government has not decided about 5th Pay Commission, however as and when

> Government will decide the employees who have opted for voluntary retirement will also entitle to said benefit after considering the said recommendation and if there is a difference the same has to be paid which include (salary, dearness allowance, gratuity, leave turn into cash) all these within three months in cash. It was also decided that all these amounts are to be paid from the Renewal Fund of the Government.

2.3 The said Circular has been produced at annexure `A' to the petition.

2.4 The respondent No.1-Corporation has also issued a Circular dated 9.1.1998 and has declared to implement the said Voluntary Retirement Scheme dated 27.11.1997. In that Circular, the Government has also indicated that, if in future, if Government or its Corporation decided to increase the emoluments then those benefits may also be given to those employees and all the expenses of the voluntary scheme will be reimburse through Renewal Fund Scheme of the State of Gujarat.

2.5 The respondent No.1-Corporation has issued a Circular dated 5.1.1999 and decided to give a notional benefit of 5th Pay Commission under the Scheme. However, arrears of 5th Pay Commission was denied and in the said Circular the employees who have not given options till date or employees who have given one or other option, can give option and can also modify the option given by them. The option to be given upto 21.1.99.

2.6 Thereafter, the respondent No.1-Corporation has issued Circular dated 8.7.999 (impugned circular) whereby all earlier Circulars were cancelled and one new scheme of Voluntary Retirement was introduced. In that scheme no options were given. In impugned circular an option of being considered as surplus employee is totally dropped. It was also stated that those who do not opt for voluntary retirement will be relieved from the services in accordance with law or as per the decisions of the Board for Industrial & Financial Reconstruction (hereinafter referred to as `BIFR'). As regards recommendation of 5th Pay Commission, a notional benefit will be given and not the benefit which was envisaged earlier in cash to be given. The Clause 8 also provides that once application for resignation is given the same cannot be withdrawn. In the present petition this

circular has been challenged as arbitrary and violative of Articles 14 and 16 of the Constitution of India.

SUBMISSION ON BEHALF OF EMPLOYEES:

3. Shri P.M.Thakkar, learned Senior Counsel alongwith Mrs.Sangeeta Pahwa, learned advocate are appearing on behalf of the petitioner.

3.1 Learned Counsels for the petitioner submitted that Circular dated 27.11.1997 is applicable in the present case for following reasons:

(a) When the impugned Voluntary Retirement Scheme came into existence by Circular dated 8.7.99, the Government policy dtd.27.11.97 was in existence and the modified policy dtd.28.7.99 was not in existence and therefore the policy which was not in existence when the impugned Voluntary Retirement Scheme was floated, the same cannot be consonance with the future policy.

(b) Modified policy is not made retrospective.

(c) Modified policy itself provides that in those public sectors in which voluntary retirement scheme has sanctioned, the earlier policy would be applicable. In present case, the impugned policy dtd.8.7.99 was sanctioned which is evident from Annexure `B' page 27 of the petition and therefore the earlier policy dtd.27.11.97 would be applicable.

3.2 It was further submitted that the policy dtd.27.1197 gives two options namely the Voluntary Retirement Scheme as per the benefits enumerated therein and placement on the Surplus Cell Pool for being considered to be employed in other public sector. It was submitted that the impugned Voluntary Retirement Scheme floated by Gujarat Dairy Development Corporation does not provide for the option on Surplus Pool. It was submitted that though the Government declares that the employees of all the Public Sectors, which are to be closed in pursuance of "Public Sector Revival Programme" will be given the benefits of Surplus Cell Pool and though the other Public Sector namely GCEL, Gujarat Jal Sampaty Nigam Ltd., Gujarat Matshya Corporation Ltd. has given

the said benefits, the employees of Gujarat Dairy Development Corporation are not given the same treatment which were given to the other Public Sector Employees. It was further submitted that the policy dated 28.7.99 is applicable then also the said policy dated 28.7.99 is the modification of the policy dtd.27.11.97. The modified policy does not take away the benefits which are to be provided for those employees who had taken the option of Voluntary Retirement Scheme as provided in Clause B 5(b) of 1997 namely arrears in Cash of 5th Pay Commission. It was submitted that Clause B-5(b) provides that those Public Sector employees who have accepted the conditions of the Government and who have accepted the Voluntary Retirement Scheme will be given the benefits of Revised Pay Scale and the pay scale of these employees will be fixed as per revised pay scale and the amount of compensation i.e. salary plus dearness allowance plus gratuity plus leave encashment will be calculated as per revised pay scale and the same will be paid within 3 months in cash.

3.3 Learned counsels for the petitioner further submitted that by impugned circular the Corporation has not given compensation in cash as per the 5th Pay Commission to the employees whereas all the Public Sector Employees have given said benefits in cash. It was submitted that since the benefit is given notionally, it is not open for the Government to pick and choose some Corporation by giving different treatment to others. It is not open for the Government to implement the policy in discriminatory manner. It was further submitted that the Government as well as Corporation has implemented the policy qua Gujarat Dairy Development Corporation employees in a discriminatory manner which is against the settled legal position in this behalf.

3.4 In support of the aforesaid submission, the learned Counsel for the petitioner has relied upon following authorities:

3.5 The learned Counsels have relied upon the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. K.P.Joseph and Others reported in 1973 S.C. 303. In para 10 and 11 the Hon'ble Supreme Court has observed as under:

"Para 10. In Union of India v. M/s. Indo Afghan Agencies Ltd. (1968) 2 SCR 366 at p. 377 = (AIR 1968 SC 718), this Court, in considering the nature of the Import Trade Policy said:

"Granting that it is executive in character, this Court has held that Courts have the power in appropriate cases to compel performance of the obligations imposed by the Schemes upon the departmental authorities." To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that we have imported the principle of natural justice of audi alteram partem into this area. A very perceptive writer has written:

"Let us take one of Mr.Harrison's instances, a regulation from the British War Office that no recruit shall be enlisted who is not five feet six inches high. Suppose a recruiting officer musters in a man who is five feet five inches only in height, and pays him the King's shilling; afterwards the officer is sued by the Government for being short in his accounts; among other items he claims to be allowed the shilling paid to the undersized recruit. The Court has to consider and apply this regulation and, whatever its effect may be, that effect will be given to it by the Court exactly as effect will be given to a statute providing that murderers shall be hanged, or that last wills must have two witnesses." (John Chipman Gray on "The Nature and Sources of the Law").

"Para.11 We should not be understood as laying down any general proposition on this question. But we think that the Order in question conferred upon the first respondent the right to have his pay fixed in the manner specified in the Order and that was part of the conditions of his service. We see no reason why the Court should not enforce that right."

3.6 The learned Counsels have further relied upon the judgment of the Hon'ble Supreme Court in the case of Purshottamlal and others Vs. Union of India and another, reported in AIR 1973 SC 1088. In para 15 the Hon'ble Supreme Court has observed as under:

"Mr. Dhebar contends that it was for the

Government to accept the recommendations of the Pay Commission and while doing so to determine which categories of employees should be taken to have been included in the terms of reference. We are unable to appreciate this point. Either the Government has made reference in respect of all Government employees or it has not. But if it has made a reference in respect of all Government employees and it accepts the recommendations it is bound to implement the recommendations in respect of all Government employees. If it does not implement the report regarding some employees only it commits a breach of Arts. 14 and 16 of the Constitution. This is what the Government has done as far as these petitioners are concerned."

3.7 The learned Counsels have also relied upon the judgment of the Hon'ble Supreme Court in the case of Dr.Amarjit Singh Ahluwalia Vs. State of Punjab reported in 1975(3) SCC 503. On page 510 the Hon'ble Supreme Court has observed as under:

"Now, it is true that clause(2)(ii) of the memorandum dated October 25, 1965 was in the nature of administrative instruction, not having the force of law, but the State Government could not at its own sweet will depart from it without rational justification and fix an artificial date for commencing the length of continuous service in the case of some individual officers only for the purpose of giving them seniority in contravention of that clause. That would be clearly violative of Articles 14 and 16 of the Constitution. The sweep of Articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the `State'. Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under Articles 14 and 16. It is interesting to notice that in the United States it is now well settled that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Vide the judgment of Mr.

Justice Frankfurter in Vitaralli v. Seaton. This view is of course not based on the equality clause of the United States Constitution and it is evolved as a rule of administrative law. But the principle is the same, namely, that arbitrariness should be eliminated in State action. If, therefore, we find that the order dated December 4, 1967 gave an artificial date from which the continuous service of respondents Nos. 3 to 19 shall be deemed to have commenced, though in fact and in truth their continuous service commenced from different dates and it was thus in contravention of the principle of seniority laid down in clause (2)(ii) of the memorandum dated October 25, 1965, it would have to be held to be void as being violative of Articles 14 and 16."

3.8 The learned Counsels have also relied upon the judgment of the Hon'ble Supreme Court in the case of State of Mysore and Another Vs. H.Srinivasmurthy reported in 1976(1) SCC 817. He has relied upon para 18 of the said judgment.

"On the other hand, it is an undisputed fact that six other employees, who were similarly situated, were absorbed from the dates on which they initially joined duty, after deputation to the polytechnics. It is not the case of the appellant that this principle whereby the absorption in the Department of Technical Education was related back to the date on which a person initially came on deputation, was ever departed from, excepting in the case of the respondent. This being the case, the High Court was right in holding that the State Government had evolved a principle that if a person was deputed to the Department of Technical Education from another department and he stayed on in that other department for a reasonable long time his absorption in that department should be made to relate back to the date on which he was initially sent. There was no justification whatever to depart from this principle of policy in the case of the respondent, who was, in all material respects, in the same situation as K.N.Chetty."

3.9 The learned counsels have also relied upon the judgment of the Hon'ble Supreme Court in the case of Ramana Dayaram Shetty Vs. The International Airport Authority of India and others reported in AIR 1979 S.C.

1628. They have relied upon Paras 20, 21 & 34 of the said judgment.

"Para 20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

"Para 21. This rule also flows directly from the doctrine of equality embodied in Art.14. It is now well settled as a result of the decisions of this Court in E.P.Royappa v. State of Tamil Nadu, (1974) 2 SC 348 that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory; it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory."

"Para 34. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th

respondent was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

3.10 The learned Counsels have also relied upon in the case of Miss Nishi Maghu & Others Vs. State of Jammu & Kashmir reported in 1980(4) SCC 95. They have relied upon Para 12 of the said judgment.

"The fact that the allotment of marks is in accordance with a policy decision may not conclude the matter in all circumstances; if that decision is found to be arbitrary and infringing Article 14 of the Constitution, it cannot claim immunity from challenge. When we say this we are not unmindful of the observations in Peeriakaruppan case quoted above, which were made in a somewhat similar but not altogether identical situation."

3.11 The learned counsels have also relied upon in the case of Omprakash Sud, Shamlal Kapur, Pavankumar Sharma Vs. State of Jammu and Kashmir and others reported in AIR 1981 SC 1001. They have relied upon para 8 of the said judgment which reads as under:

"Equality before the Law" or "equal protection of the laws" within the meaning of Article 14 of the Constitution of India means absence of any arbitrary discrimination by the law or in their administration. No undue favour to one or hostile discrimination to another should be shown. A classification is reasonable when it is not an arbitrary selection but rests on differences pertinent to the subject in respect of which the classification is made. The classification permissible must be based on some real and substantial distinction, a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis ..... (See State of West Bengal v. Anwar Ali, 1952 SCR 284 : (AIR 1952 SC 75). The classification must not be arbitrary but be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out. Those qualities or characteristics must have a reasonable relation to the object of

the law. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. (See 1952 SCR 284) : (AIR 1952 SC 75). We are not unaware that the rule of equality does not mean mathematical equality and that it permits of practical inequalities. But what is needed is that the selection of the quota seekers as in the case in hand should have a rational relation to the object sought to be achieved in the industrial policy decision of the State. If the selection or differentiation is arbitrary and lacks a rational basis it offends Article 14."

3.12 The learned Counsels have also relied upon in the case of Sriniketan Co-op. Group Housing Society Ltd. Vs. Vihar Co-op. Group Housing Society Ltd. and others reported in AIR 1989 SC 1673. In para 28 on page 1684 the Hon'ble Court has observed as under:

"Another factor worthy of note is that even in the application of the norm `first come first served', the Government had not followed a uniform policy. The High Court has pointed out that initially five societies were selected for allotment of land on the basis of `first come first served' but subsequently one of the societies was dropped out and there is no explanation for the said society being dropped out. In addition the High Court has commented on the fact that when the Registrar had sent a list containing the names of 15 societies, the Ministry had selected only four societies for allotment of land and rejected the applications of the other societies. No explanation is forth coming for not alloting land to those societies. As the norm of `first come first served' had not been followed in the case of all the applicant societies, the Government of India had to concede in the counter-affidavit filed by Shri A.K.Goyal that the principle `first come first served' was not universally applied to all the societies

which had been allotted land. Since all the eligible societies were not treated alike and allotted land, the High Court has held that the allotment of land had been done in an arbitrary manner. This finding cannot be said to be wrong."

3.13 The learned counsels have also relied upon the decision in the case of State of Kerala Vs. Kumari T.P.Roshana and others reported in AIR 1979 SC 765. In para 34 the Hon'ble Court has observed as under:

"Nor is law unimaginative, especially in the writ jurisdiction where responsible justice is the goal. The court cannot adopt a rigid attitude of negativity and sit back after striking down the scheme of Government, leaving it to the helpless Government caught in a crisis to make do as best as it may, or throwing the situation open to agitational chaos to find a solution by demonstrations in the streets and worse. We are, therefore, unable to stop with merely declaring that the scheme of admission accepted by Government is ultra vires and granting the relief to the petitioner of admission to the medical college. The need for controlling its repercussions calls for judicial response. After all, law is not a brooding omnipresence in the sky but an operational art in society."

3.14 Learned counsels for the petitioner further relied upon the judgment in the case of Delhi Transport Corporation Vs. DTC Mazdoor Congress and others reported in AIR 1991 SC 101 and contended that Public Corporation is also `State' within the meaning of Article 12 of the Constitution of India. In para 256 on page 193 the Court has observed as under:

"`Sutherland, in his Statutes and Statutory Construction Third Edition Vol.3 paragraph 5904 at pages 131-132 has stated that the most reliable source of public policy is to be found in the federal and state constitutions. Since constitutions are the superior law of the land, and because one of their outstanding features is flexibility and capacity to meet changing conditions, constitutional policy provides a valuable aid in determining the legitimate boundaries of statutory meaning. Thus public policy having its inception in constitutions may

accomplish either a restricted or extended interpretation of the literal expression of a statute. A statute is always presumed to be constitutional and where necessary a constitutional meaning will be inferred to preserve validity. Likewise, where a statute tends to extend or preserve a constitutional principle, reference to analogous constitutional provisions may be of great value in shaping the statute to accord with the statutory aim or objective. Article 14 sheds the light to public policy to curb arbitrariness."

3.15 The learned Counsels have also relied upon the judgment in the case of Hasmukhbhai Dhanjibhai Zaveri v. R.Parthasarthy reported in 1971(12) GLR 128. In para 18 on page 130 the Division Bench of this Court has observed as under:

"We are, therefore, of the opinion that both from the point of view of the language employed by the Legislature as well as of the consequences which ensue from an order under sec.258 of the Act, it is clear that the power conferred upon the Municipal Commissioner under sec.258 of the Act is a quasi judicial power and before cancelling a permission in exercise of the power conferred upon him under the said section, the Municipal Commissioner should consider the question arising before him in a judicial spirit. In exercising the power, the Municipal Commissioner must act justly and fairly and not arbitrarily or capriciously; he must exercise the power in consonance with principles of natural justice. We are also of the opinion that when the Municipal Commissioner proposes to take an action under the said section, the minimum compliance with the rules of natural justice that is required of him would be that : (i) the particulars of the alleged material misrepresentation or fraudulent statement attributed to the person likely to be affected by the order should be clearly and precisely communicated to him; (ii) the person likely to be affected should be communicated the material on the basis of which the material misrepresentation or fraudulent statement is imputed to him and such material should not be confined only to the evidence led before the Municipal Commissioner himself but should also cover the material

gathered at the fact finding inquiry which may have been conducted by any other appropriate officer as also the report, if any, submitted by such officer to the Municipal Commissioner on the basis of which he proposes to take action and (iii) the person likely to be affected should be given a fair and reasonable opportunity to explain his case and to correct or controvert any statement prejudicial to him with a view to absolving himself of the charge levelled against him."

4. After referring to the aforesaid authorities, the learned counsels for the petitioners have submitted that the argument of the Corporation that 5th Pay Commission cannot be given to its employees because at Page 88 of the petition, the BIFR has said that Sick Industries Company is expected to pay wages to the extend it could effort, is required to be rejected because the petitioner is seeking the relief under 27.11.1997 Circular which is declared by the Government for the revival of all public sectors and Voluntary Retirement Scheme is in pursuance of Government Resolution dated 27.11.97. The impugned Voluntary Retirement Scheme is not a part of rehabilitation scheme and the opinion of BIFR is prima facie would be of importance when Voluntary Retirement Scheme is part of rehabilitation scheme. When the Corporation is closed and is not to be revived. The suggestions of BIFR would be of some relevance if it was to be revived in this behalf.

4.1 The learned Counsels for the petitioner further submitted that the Circular dated 8.7.99 can be challenged because the same is not in consonance with the Government Circular dated 27.11.97. It has also been submitted that as surplus pool as provided in Government Circular is not provided in impugned Circular dated 8.7.99. The learned Counsels have also submitted that the Government Circular dated 9.1.98 which was also declared by the Corporation regarding VRS and gave two options as given in Government Circular. The learned Counsels further submitted that the Corporation gave option of surplus pool before 29.12.98 and thereafter by impugned circular dated 8.7.99 the said option is taken away.

4.2 The learned counsels for the petitioner further submitted that the Government and the Government Corporation has acted differently with the different corporations. The learned Counsels have submitted that about 106 employees of GCEL were absorbed who were

declared surplus somewhere on 29.12.98. It was further submitted that the 9 employees of Matsudyog were absorbed through surplus cell on 15.1.99. It was further submitted that 130 employees of Bandhkam Nigam were absorbed on 30.1.99. It was further submitted that when petitioners were considered before 29.12.98 (when they gave option), all could have been absorbed and that is why the policy of surplus pool has detrimental effect on the employees. It was further submitted that regarding surplus employees there is no effect on corporation because during one year in which the employee will be treated as surplus and the employees will be paid some subsistence allowance which will be adjusted ultimately after one year if they are not absorbed against their dues of voluntary retirement.

4.3 It was further submitted that Government Resolution dtd.27.11.97 provides that those public sector undertakings who have accepted the service condition of Government employees will be given the arrears of 5th Pay Commission has been given the arrears of 5th Pay Commission of revised pay scale in cash whereas the impugned circular only grants notional benefits of 5th Pay Commission. It was further submitted that Voluntary Retirement Scheme was sanctioned in the year 1997 and therefore the Government Resolution dated 28.7.99 will not be applicable because the Circular dated 27.11.97 was already sanctioned earlier.

4.4 The learned counsels have further submitted that the employees who opt for Voluntary Retirement Scheme and those who have not opt for Voluntary Retirement Scheme are of different class and therefore there is no discrimination. The benefits of pay revision is given as an incentive for opting for Voluntary Retirement Scheme and there cannot be any question of discrimination. It was further submitted that the Gujarat Dairy Development Corporation has provided only Voluntary Retirement Compensation as per 5th Pay Commission but has not provided Pay Revision as per 5th Pay Commission and thus Gujarat Dairy Development Corporation has deviated from the policy laid down by the Government which is not open for Gujarat Dairy Development Corporation.

ADDITIONAL SUBMISSIONS ON BEHALF OF PETITIONER BY LEARNED ADVOCATE MR.B.M.MANGUKIYA.

5. Shri B.M.Mangukiya, learned advocate for the petitioner in the case of Special Civil Application

No.5743/99 has supported the contention of Mr.P.M.Thakkar, learned Senior Counsel in this behalf. Over and above, he submitted that Clause 8 of the policy which provides that once the employee opted the option for voluntary retirement it cannot be withdrawn as the same is illegal and same is contrary to public policy in view of sec.23 of the Contract Act. He further stated that the provisions that voluntary retirement cannot be withdrawn is also violative of the contractual right of the employee.

5(A). The learned advocate for the petitioner also submitted that the impugned retirement scheme of 1999 is illegal and liable to be set aside as the same is contrary to and inconsistent with the earlier policy declared by the Government dated 27.11.97. He submitted that in view of Sec.23 of the Contract Act, the Corproation cannot frame a policy in service jurisprudence which gives absolute dominance in service jurisprudence and the same is void and against public policy.

5(B) He further submitted that when the resignation has been given till the same is accepted, the employee has right to withdraw the same before the acceptance. He further submitted that the Corporation being an agency and instrument of the State it must act fairly and hence the Corporation has not acted fairly the impugned circular is liable to be set aside.

5.1 He has relied upon the judgment of the Hon'ble Supreme Court in the case of LIC of India and Another Vs. Consumer Education & Research Centre and Others reported in (1995)5 SCC 482. In para 27 on page 500 the Hon'ble Supreme Court has held as under:

> "In the sphere of contractual relations the State, its instrumentality, public authorities or those who acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those

under public duty or obligation must be informed by reason and guided by the public interest."

5.2 He has also relied upon the another judgment of the Hon'ble Supreme Court in the case of Nand Keshwar Prasad Vs. Indian Farmers Fertilizers Co-operative Ltd. and Others reported in 1998(5) SCC 461. In para 11 on page 464 the Hon'ble Supreme Court has observed as under:

"After giving our careful consideration to the facts and circumstances of the case, it appears to us that the law is well settled by this Court in a number of decisions that unless controlled by condition of service or the statutory provisions, the retirement mentioned in the letter of resignation must take effect from the date mentioned therein and such date cannot be advanced by accepting the resignation from an earlier date when the employee concerned did not intend to retire from such earlier date. It has also been held by this Court that it is open to the employee concerned to withdraw letter of resignation before the same becomes effective."

5.3 He has also relied upon another judgment in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another reported in (1986)3 SCC 156. In para 76 and 77 the Hon'ble Supreme Court has observed as under:

"Para 76. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. The word "unconscionable" is defined in the Shorter Oxford English Dictionary, Third Edition, Volume II, page 2288, when used with reference to actions etc. as "showing no regard for conscience; irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable."

"Para 77. Although certain types of contracts were illegal or void, as the case may be, at Common Law, for instance, those contrary to

public policy or to commit a legal wrong such as a crime or a tort, the general rule was of freedom of contract. This rule was given full play in the nineteenth century on the ground that the parties were the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced qualifications and exceptions to his liability in clauses which are today known as "exemption clauses" and the other party accepted them, then full effect would be given to what the parties agreed. Equity, however, interfered in many cases of harsh or unconscionable bargains, such as, in the law relating to penalties, forfeitures and mortgages. It also interfered to set aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, or unconscionable contracts with expectant heirs in which a person, usually a money-lender, gave ready cash to the heir in return for the property which he expects to inherit and thus to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice (See Chitty on Contracts, Twenty-fifth Edition, Volume I, paragraphs 4 and 516."

5.4 The learned counsel for the petitioner further submitted that the present petition challenging the decision of the State of not following its own policy. It was further submitted a catena of judgments have been cited before this Hon'ble Court which lay down the principle clearly that in service jurisprudence, deviation of State policy is not permissible and it is held arbitrary and violative of Article 14 of the Constitution of India. It was further submitted that the State Government has allowed the benefits of the policy decision declared by the State vide resolution dated november 27, 1997. The State Government has not withdrawn even while amending its own policy vide communication dated July 28, 1999. The amended policy only took away the benefit of surplus pool. The benefit of Fifth Pay Commission including pay revision and arrears is not even withdrawn by the State till today and the said policy of the State is still in vogue and is

being implemented consistently in respect of other Statutory Corporations. The employees of the Corporation are the employees of the Statutory Corporation of the State and therefore it cannot be said that the employees of the Corporation are a class within class and therefore the Corporation is free to decide its own policy and deal with the employees differently. It was further submitted that a class of employees who were employed by the Statutory Corporation of the State Government and the employees of one Statutory Corporation cannot be treated differently. It was further submitted that the State and Corporation now wanted to implement the said policy with retrospective or retroactive effect. The amended policy of the State nowhere contemplates that it would be implemented with retrospective or retroactive effect. It was further submitted tha the offers which were submitted on July 26, 1999, obviously would be governed by the rights, which were existing on that day and therefore the said policy as amended vide notification dated 28.7.99 is applicable and the petitioners are not entitled the policy dated 27.11.1997. It was further submitted that the members of the petitioner-Union have submitted their forms on July 26, 1999, and on that day the employees of the Statutory Corproations were entitled to all benefits made available as recommended by the Fifth Pay Commission and the benefit of service pool. It was further submitted that service jurisprudence policy of the State has to be implemented consistently and no deviation would be permissible. Any deviation therefrom is bound to hit by Article 14 of the Constitution of India. It was further submitted that the State Corporation is a model employer and it cannot act contrary to the interest of the employees. By this policy the State is exploiting its employees.

SUBMISSION ON BEHALF OF CORPORATION BY SHRI K.M. PATEL:

6. On behalf of respondent No.1-Corporation Mr.K.M.Patel, learned advocate is appearing and he has invited my attention to the affidavit of Shri S.J.Mehta, Manager (Adm.) has been filed somewhere on 30th August, 1999. He has invited my attention to some of the paragraphs of that affidavit and explained the background in which Voluntary Retirement Scheme came to introduced by the respondent No.1-Corporation.

6.1 He has also invited my attention to the contention raised by the petitioner and also some of the authorities cited by the petitioner in this behalf. Dealing with the contention of the petitioner, the

learned advocate has submitted as follows:

6.1(1) Surplus Pool Formula: It is submitted that VRS is voluntary in character and there is no compulsion on either side to float VRS or to accept VRS. As far as the terms and conditions of VRS are concerned, it is essentially a matter of policy and managerial function. The Unions or the Employees cannot seek a writ of mandamus to have a policy decision on a particular line. Whether surplus pool should be provided in VRS or not is a matter of policy.

6.1(2) In the matter of framing a policy, scope of judicial review is extremely limited and circumscribed as held by the Hon'ble Supreme Court in Asif Hameed Vs. State of J.K AIR 1989 SC 1899.

In support of the same, he has relied upon the the judgment of the Hon'ble Supreme Court in the case of Asif Hameed and others Vs. State of Jammu and Kashmir and others reported in AIR 1989 SC 1899, particularly para 19 on page 1906 the Hon'ble Supreme Court has observed as under:

"When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature of the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike-down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

6.1(3) The decisions which are cited in the written submissions of the Unions are not applicable to the facts of the present case. It is not the case of the Union that within the class comprising of the employees of the Corporation,

the Corporation has not followed its VRS scheme or has discriminated its employees. The judgments referred to by the Union, particularly AIR 1973 SC 1303, AIR 1973 SC 1088, (1975) 3 SCC 504, (1976) 1 SCC 817, AIR 1981 SC 1001, AIR 1989 SC 1673 have no application to the facts of the case since in those cases the policy decision pronounced was not followed or implemented evenly and there was discrimination amongst similarly situated persons. In the present case, there is no such discrimination.

6.1(4) As far as non-inclusion of formula of surplus pool in VRS scheme is concerned, apart from that being a matter of policy, it has been pointed in the reply affidavit of the Corporation that the new VRS scheme has been floated after discussing the matter with the State Government. The VRS scheme was circulated on 8.7.99 whereas formal GR deleting surplus pool formula from the GR dated 27.11.97 came to be issued on 28.7.99. The GR is not statutory in character and that it cannot be contended that unless it is repealed, it operates by force of law. The Government's action of deleting surplus pool formula by GR dated 28.7.99 and the action of the Corporation in not providing surplus pool in its VRS published on 8.7.99 are almost simultaneous and it cannot be said that there is no justification or reason for non-inclusion of surplus pool formula in the VRS scheme of the Corporation.

6.1(5) As pointed out in the affidavit in reply, the Corporation had floated VRS in consonance with GR dated 27.11.97. But nothing could be finalised in view of the writ petitions filed by the concerned employees and Unions. With the passage of time, things changed. It is evident that the process of deleting surplus pool formula by the Government was on hand when the Corporation floated its VRS in consultation with the Government. There is, therefore, nothing arbitrary or violative of Article 14 of the Constitution of India.

6.1(6) A comparison sought with other public sector undertakings is legally not sustainable since the employees of the respondent Corporation constitute a different, distinct and separate class. In cases of other public sector undertakings, VRS in terms of GR dated 27.11.97

was floated and the employees availed the benefits whereas in case of the Corporation, it could not do so on account of the pendency of the petitions filed against the VRS scheme floated on 8.1.98 in terms of GR dated 27.11.97.

6.2 5th Pay Commission Arrears:

6.2(1) That the employees cannot as of right assert that their pay should be revised and difference of pay should be paid as per the 5th Pay Commission Recommendations as a condition of VRS. The GR dated 27.11.97 pertained only to voluntary retirement scheme. The subject matter of the resolution was not pay revision in accordance with the Fifth Pay Commission recommendations. When GR dated 27.11.97 was issued, Fifth Pay Commission Recommendations were not implemented. But the Government was contemplating to implement the same. Keeping that aspect in mind clause 5(b) of GR dated 27.11.97 (page 21 of SCA No.5498/99) provided for payment of difference payable in the amount of compensation as and when the Fifth Pay Commission recommendations are accepted and implemented. Clause 10 of said GR dated 27.11.97 also speaks of debiting all the expenses of VRS in the said mutual fund. GR dated 27.11.97 does not speak of pay revision as per 5th Pay Commission recommendations and payment of arrears or difference of salary. It is submitted that to read pay revision as per 5th Pay Commission Recommendations and payment of difference as a condition of VRS is plainly beyond the scope of the circular and not maintainable.

6.2(2) There is no dichotomy or inconsistency with the VRS scheme of the Corporation floated on 8.7.99 and the GR dated 27.11.97. Clause 5(b) provided for payment of difference in the amount of compensation under VRS as and when 5th Pay Commission Recommendations are accepted. Clause 5 of VRS dated 8.7.99 (page 32 of SCA No.5498/99) also provides for payment of compensation under VRS on the basis of pay scales recommended by 5th Pay Commission by notionally carrying out pay fixation on scale to scale basis. It is, therefore, submitted that as far as compensation under VRS is concerned, notwithstanding the fact that the Corporation has not implemented the 5th Pay Commission recommendations, compensation

under VRS is paid as per 5th Pay Commission Recommendations. There is, therefore, no discrimination, dichotomy or inconsistency between the scheme of VRS dated 8.7.99 and GR dated 27.11.97.

6.2(3) As far as arrears or difference of salary as per 5th Pay Commission Recommendations are concerned, it is reiterated that no such pay revision is contemplated as a condition of VRS. Moreover, the Corporation on account of its precarious financial position is not in a position to take any further financial burden. Its accumulated losses as on 31.3.99 were Rs.84 crores as stated in the affidavit-in-reply. Accumulated losses increased to Rs.119.03 crores at the end of financial year 1999-2000 ending on 31.3.2000.

6.2(4) If the contention of the petitioner that difference in salary on the basis of 5th Pay Commission Recommendations shall also be paid for those who opted to avail the VRS, it will create discrimination amongst the same class of employees working in the Corporation. In that eventuality, those employees who opted for VRS will get all the benefits as per the 5th Pay Commission Recommendations whereas those who have not opted for VRS will continue to draw wages as per the 4th Pay Commission Recommendations. Such a demand, therefore, cannot be accepted.

6.2(5) The Corporation being a sick industrial company cannot be saddled with any additional financial burden. The Corporation is relying on the judgment of the Hon'ble Supreme Court in the case of Standing Conf. of Public Enterprise v. New Delhi Mazdoor Union, 1995 Supp.(1) SCC 196, judgment of this Hon'ble Court in the case of Abad Dairy v. Manjibhai Dhanjibhai, 2000(3) GLH 409 and an unreported judgment dated 30.9.94 of the learned Single Judge in Special Civil Application No.7756 of 1994.

6.3 Action of relieving the Employees:

6.3(1) The Corporation submits that as per clause 8 of the VRS dated 8.7.99, the application for VRS submitted by the employee is irrevocable and final and cannot be withdrawn. The proforma of application for VRS (page 34 of SCA No.5498/99) stipulates that the employee has read the terms

and conditions of VRS and the same are acceptable to him. It is, therefore, submitted that the petitioners who submitted VRS knew very well that once they give applications, it was not open for them to withdraw the same. As stated in the affidavit-in-reply, in SCA No.5743 of 1999, all the applications received by the Corporation were unconditional. Those applications could not have been withdrawn in view of clause 8. The action of the Corporation in accepting the application and relieving the employees is therefore in accordance with the contract between the parties.

6.3(2) In support of the same, he has relied upon the judgment of Himachal Pradesh High Court in the case of Jeet Ram Vs. H.P.State Handicrafts and Handloom Corpn.Ltd reported in 1998(3) Labour Law Journal p.772. In para 10 the Division Bench consisting of (Mr.S.N.Phukan, Chief Justice as he was then and Mr.Justice R.L.Khurana) has observed as under:

"A perusal of Annexure R-2, vide which the Voluntary Retirement Scheme was made applicable to the employees of the respondent-Corporation and options for voluntary retirement under the Scheme were invited, there is a specific condition that the option once exercised would be final and the employee having once exercised the option, would have no right to withdraw the same. In view of such specific condition contained in the Scheme, it was not open to the petitioner to withdraw his option for voluntary retirement at a subsequent stage. Therefore, the respondent-Corporation was justified in rejecting the request made by the petitioner vide his letter dated May 17, 1993 (Annexure P-4), withdrawing his earlier option seeking premature retirement from service."

6.3(3) The two decisions relied on by the petitioners in support of its case that the resignation can be withdrawn by the employee before effective date, viz. (1978) 2 SCC 301 and (1998) 5 SCC 461 laying down proposition that the resignation can be withdrawn before effective date are not applicable to the facts of the present case. Those were cases of resignation or voluntary retirement under the Rules and not voluntary retirement under VRS package by way of Golden

handshake. There was no condition like condition No.8 expressly providing that the application once given will be final and cannot be withdrawn by the employee. Moreover, in both those judgments, the proposition of law laid down is subject to an exception of a contrary provision in contract, statute or standing orders. Para 50 in the judgment reported in (1978) 2 SCC 301 and para 11 of the judgment reported in (1998) 5 SCC 461 carve out this exception. Condition No.8 of VRS is an exception. It is, therefore, submitted that the two judgments relied on by the petitioners are not applicable to the facts and circumstances of the present case.

6.3(4) As far as challenge to clause 8 of VRS being opposed to public policy is concerned, it is submitted that there is no such pleading or contention in the writ petitions. Moreover, there is rational object and purpose behind clause 8 attaching finality to the application once submitted. Keeping in mind the administrative requirement and exigencies of work, the Corporation has the discretion not to accept the VRS application. If no finality is attached to the application once submitted, it may derail all planning and projections and actions of the Corporation. For example, if the Corporation requires two security guards for watch and ward, but all the security guards submit applications under VRS, the Corporation may exercise its discretion in not accepting VRS applications of two guards. However, if there is no finality attached to the applications given by the employees, it may so happen that those employees whose applications are not accepted by the Corporation will remain with the Corporation and out of the remaining security guards 4 or 5 may subsequently withdraw their applications. With the result, as against the requirement of two security guards, the Corporation may be left with 6 to 8 security guards. Thus there is valid justification for providing finality to the applications once submitted and there is nothing opposed to public policy. The case of the judgment of the Hon'ble Supreme Court in Central Inland Water Works, (1986) 3 SCC 156 and Delhi Transport Corporation, AIR 1991 SC 101 have no application to the facts of the present case. Those were cases in which the service regulation provided for termination without assigning

reasons and the same were held opposed to public policy. It is not the case of the petitioners that any of them were coerced, forced or compelled to give application under VRS. Opting for VRS being voluntary on the part of the employee, the ratio and analogy of the said judgments would not apply to the facts of the present case.

6.4 Mr.K.M.Patel, learned advocate for the respondent No.1-Corporation has relied upon the provisions of the Industrial Disputes Act and indicated that if the employee who had not opted for the VRS then as per the provisions of the Industrial Disputes Act, he will be entitled to very meagre amount then what is offered in VRS. Therefore, it does not lie in the mouth of the employee to say that the VRS is irrational, arbitrary, illegal and liable to be set aside. Secondly, as contended by Mr.Shelat, learned Advocate General, submitted that though Gujarat Dairy Development Corporation is a Corporation of the Government but ultimately it is a Company incorporated under the provisions of the Companies Act and it has a different and distinct identity and the Corporation can frame its own rules and regulations. The policy of the Government does not bind it. The Corporation can frame its own rules and regulations and circular which are administrative instruction in this behalf.

SUBMISSION ON BEHALF OF STATE BY SHRI S.N.SHELAT, Learned Advocate General:

7. On behalf of the State Government, Shri S.N.Shelat, learned Advocate General instructed by Mr.A.D.Oza, learned Government Pleader, Mr.H.C.Patel and Mrs. Parekh, learned AGP's appeared for the Government.
7.A The learned Counsel has first tried to support the contention raised by Mr.K.M.Patel, learned advocate for the respondent No.1-Corporation. He has relied upon the affidavit-in-reply filed by Shri D.U.Parmar, Deputy Secretary working in the respondent No.2. The learned counsel have made following submissions:

7.1 First he stated that as regards Special Civil Application No.5498 of 1999 is concerned, in the prayer clause the petitioner has prayed for quashing of the Circular of 1999 and further direct the Corporation to implement policy of retirement scheme contained in Circular 1997 (i.e. a writ in nature of mandamus). It was submitted that petitioners are not entitled to the

said relief on following reasons:

7.1(1) The petitioners have not been able to show any fundamental or legal right for seeking a voluntary retirement scheme as per the Government Circular dated 27th November, 1997.

7.1(2) In the nature of things the voluntary retirement scheme is voluntary in nature. It is for the individual employees to consider whether the employees are desirous of taking the benefit of the said scheme or not. There is no right, much less a legal right, for issuing a mandamus under Article 226 of the Constitution for issuance of a voluntary retirement scheme not one which has been offered to the employees but a scheme that should be based upon the Government Circular dated 27th November, 1997.

7.1(3) The scheme offered to the employees is dated 8th July 1999. The scheme offers only payment of compensation on notional calculation having regard to the 5th Pay Commission in clause 5. The scheme does not offer any alternative employment opportunities as it was offered in earlier scheme dated 27th November 1997 offered to the employees. The scheme is wholesome and comprehensive. It is for the employees to accept it or not. There is no compulsion. No coercion has been alleged which requires avoidance of the offer which has been accepted by the company for voluntary retirement. A comprehensive policy provides that once the option is exercised, it cannot be withdrawn.

7.1(4) It was further submitted that the Government Resolution dated 28th July 1999 though passed subsequent to the offer of the scheme to the employees, it has clarified that it is not possible for the State Government to provide for any alternative employment opportunities as provided in the earlier Government Resolution dated 28th November, 1997. It is open to the State Government to change

its policy decision in respect of finance to be offered to the public sector companies for offering of voluntary retirement scheme.

7.1(5) It was further submitted that there is no discrimination in respect of any of the public sector companies by the State Government. After the Circular of 8th July, 1999, employees of no public sector/government companies have been offered the right for alternative employment with the State Government. The Corporation has not offered such voluntary retirement scheme with alternative employment opportunities. There is no lis between the employees and the State Government. The Resolution dated 28th July 1999 provides only finances to the Companies for offering VRS. It may be open to the Company to offer more lucrative scheme if it were able to do so having regard to its own financial structure. There is no retrospective operation in regard to the offering of the scheme. There is no change whatsoever in the scheme offered by the company dated 8th July 1999 by the Government Resolution dated 28th July 1999. The stand of the Government is the same all throughout.

7.1(6) It was submitted that the petitioners are therefore not entitled to enforcement of the Government Circular dated 27th November, 1997, when the said policy statement is not available as on today and the State Government has declared its policy by Resolution dated 28th July, 1999. The question of arrears of salary according to the Fifth Pay Commission becomes irrelevant in a proceeding initiated for the purpose of seeking a scheme of voluntary retirement at the choice of the petitioners. No such directions can be issued in favour of the petitioners providing for a scheme of voluntary retirement at their own choice.

7.1(7) There is no departure from the policy. On 8th July 1999 and thereafter no

employees of any Corporation are given benefit of Resolution dated 27th November, 1997.

7.1(8) It was further submitted that the Government Resolution dated 27th November, 1997 is not enforceable at law, having regard to the Resolution dated 28th July 1999, which now covers the field. The case laws referred to hereinafter do not help the petitioners because the Government has not ignored its policy. The stand of the State Government is consistently the same. 27th November, 1997, Resolution is not in force and no company has been given benefit thereof any time after 8th July, 1999. The company was aware of the change in the policy decision that was to take effect and therefore the company has submitted the scheme before the employees on 8th July, 1999, in consonance with the Government Circular dated 28th July, 1999. There is no breach of Article 14. The action of the company or that of the State Government is not arbitrary or irrational in any manner whatsoever.

7.1(9) It was further submitted that the employees of the company are not employees of the State Government. A Government Company is not Government of Gujarat. Government of Gujarat may be a shareholder of the company but it is not the company itself.

7.1(10) It was further submitted that it is open to the State Government to change its policy decision having regard to the exigency of the finance. The High Court cannot, under Article 226 of the Constitution, direct the State Government to make expenditure. Administrative resolutions passed by the State Government under Article 162 are not justiciable and not enforceable. There is no lis between the petitioners and the State Government.

7.2 In support of the aforesaid submissions, the

learned Counsel for the State has relied upon following authorities.

7.3 He has also relied upon the judgment of the Hon'ble Supreme Court in the case of M/s. Electronics Corporation of India Ltd. Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh and others reported in AIR 1999 SC 1734 particularly para 15 on Page 1738 the Hon'ble Supreme Court has observed as under:

> "A clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares."

7.4 He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Board of Trustees for the Visakhapatnam Port Trust Vs. State of Andhra Pradesh and others reported in AIR 1999 SC 2552, particularly para 5 the Hon'ble Supreme Court has observed as under:

> "In a Constitution Bench decision of this Court in Electronics Corporation of India Ltd. Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh (1999) 4 SCC 458 : 1999(3) Scale 125: (1999 AIR SCW 1367 : AIR 1999 SC 1734), it was held that the Electronics Corporation of India Ltd. a Government company, was distinct from the Central Government and Art.285 was not applicable in the case of a Government company. Following the ratio in the aforesaid two decisions it has to be held that Board is not exempt from taxation under Art.285 of the Constitution."

7.5 He has relied upon the judgment of the Hon'ble Apex Court in the case of State of Punjab and others Vs. Ram Lubhaya Bagga etc. reported in AIR 1998 SC 1703. In Para 29 on page 1711 the Hon'ble Supreme Court has observed as under:

> "No State of any country can have unlimited resources to spend on any of its project. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent

finance permit. If no scale or rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same. Hence we come to the conclusion that principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India."

7.6 He has also relied upon the judgment reported in the case of The Union of India and Others Vs. Shri Tejram Parashramji Bombhate & Others reported in J.T. 1991(2) 572, particularly para 4 the Hon'ble Court has observed as under:

"No Court or the Tribunal could compel the Government to change its policy involving expenditure. The Tribunal therefore, could not have, issued the directions as it did to compel the Central Government to assess the needs of the school and create the necessary posts without support of law."

7.7 He has also relied upon the judgment reported in the case of P.T.R.Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others reported in AIR 1996 SC 3461. In para 5 the Hon'ble Supreme Court has observed as under:

"It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government are satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no

vested or accrued right for the issuance of permits on the MEE or NQE, nor the Government is bound by its previous policy. It would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, therefore, was right in its conclusion that the Government are not barred by the promises or legitimate expectations from evolving new policy in the impugned notification.

7.8 He has also relied upon the judgment in the case of G.J.Fernandez Vs. The State of Mysore and others reported in AIR 1967 SC 1753. In para 12 the Hon'ble Supreme Court has observed as under:

"Before however we consider the question whether instructions in the Code have been followed or not, we have to decide whether these instructions have any statutory force. If they have no statutory force, they confer no right on anybody and a tenderer cannot claim any rights on the basis of these administrate instructions. If these are mere administrative instructions it may be open to Government to take disciplinary action against its servants who do not follow these instructions but non-observance of such administrative instructions does not in our opinion confer any right on any member of the public like a tenderer to ask for a writ against Government by a petition under Article 226."

7.9 He has also relied upon the another judgment reported in the case of Shashikant Laxman Kale and Another Vs. Union of India and another reported in 1990(4) SCC 366. In para 36 on page 386 the Hon'ble Supreme Court has held as under:

"As already indicated, clause (10-C) of Section 10 of the Act itself mentions economic viability of a public sector company as the most relevant circumstance to attract the provision. The economic status of employees of a public sector company who get the benefit of the provision is also lower as compared to their counterpart in the private sector. If this be the correct perspective as we think it is in the present case, the very foundation of the challenge to the impugned provision on the basis of economic

equality of employees in both sectors is non-existent. Once the stage is reached where the differentiation is rightly made between a public sector company and a private sector company and that too essentially on the ground of economic viability of the public sector company and other relevant circumstances, the argument based on equality does not survive. This is independent of the disparity in the compensation package of employees in the private sector and the public sector. The argument of discrimination is based on initial equality between the two classes alleging bifurcation thereafter between those who stood integrated earlier as one class. This basic assumption being fallacious, the question of any hostile discrimination by granting the benefit only to a few in the same class denying the same to those left out does not arise."

7.10 He has also relied upon the another judgment of the Hon'ble Supreme Court in the case of Union of India and others Vs. S.L.Abbas reported in AIR 1993 SC 2444. In para 7 the Hon'ble Supreme Court has observed as under:

"Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

7.11 Learned Counsel for the respondent submitted that this Court will not interfere or adjudicate upon the Government policy matter and the question of policy is essentially for the State to decide as the policy depends on number of circumstances and the Government has right to adopt any particular policy in this behalf. In short the Court cannot be propelled into the unchartered ocean of Governmental policy. For that purpose he has relied

upon the decision of the Hon'ble Supreme Court in the case of B.C. & Co. Vs. Union of India reported in AIR 1973 SC 106 in which on page 133 at para 100 it is observed as follows:

"That there can be no unlimited right to acquire or use a scarce commodity like newsprint can admit of no doubt. The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of Governmental policy."

7.12 He has also relied on the judgment of the Hon'ble Supreme Court in the case of State of U.P. Vs. Vijay Bahadur Singh reported in AIR 1982 SC 1234 particularly para 3 of the judgment where the Government was entitled to change or revise its policy subsequent to the acceptance of the provisional bid. Therefore, the Government could refuse to accept the highest bids and could allot the lots to the Forest Corporation and thus implement the policy of legislature envisaged by the U.P. Forest Corporation Act. Even if there was no express policy decision of the government recorded after the date of auction it was implicit in the very action of the government in cancelling the auction and allotting the forest lots to the Forest Corporation.

7.13 Learned Advocate General has also submitted that the Government has also power to change policy. The executive power is not limited to frame a particular policy. It has untrammeled power to change, rechange, adjust and readjust the policy taking into account the relevant and germane consideration. It is entirely in the discretion of the Government how a policy should bee shaped. He has relied upon the judgment of the Hon'ble Supreme Court in the case of Col. A.S.Sangwan Vs. Union of India and others reported in AIR 1981 SC 1545. The Hon'ble Supreme Court observed as under:

"A policy once formulated with regard to promotion of employees in a cadre of defence forces by the Union of India is not good for ever, it is perfectly within the competence of the Union of India to change it, rechange it, adjust it and readjust it according to the compulsions of circumstances and the imperatives

> of national considerations. We cannot, as Court, give directives as to how the Defence Ministry should function except to state that the obligation not to act arbitrarily and to treat employees equally is binding on the Union of India because it functions under the Constitution and not over it."

7.14 He has also relied upon the judgment of this Court in Civil Revision Application No.1260 of 2000 decided on 7.12.2000 by this Court (Coram: K.M.Mehta, J.) where the question of public policy is considered.

MY CONCLUSION:-

8. I have considered all rival submissions in this behalf. In my view, this is a question of Voluntary Retirement Scheme. It depends upon the volition of the employee. If the employee chooses, select or opt not for voluntary retirement scheme then he is still entitle for his legal rights as per the provisions of the Industrial Disputes Act, and to that extent, there is no compulsion on the employee to accept the voluntary retirement scheme. Whether the scheme of VRS is to accept it or not depend upon the volition of the employee. Once he accept, the same is governed by the provisions of the Voluntary Retirement Scheme in this behalf. After accepting the Voluntary Retirement Scheme he cannot agitate again by saying that the same is arbitrary, irrational. If he feels that Voluntary Scheme is not useful to him or beneficial to him, then it is for him not to opt or to select voluntary scheme. After accepting the same he cannot make any grievance in this behalf.

9. I am of the view that in view of the judgment of the Hon'ble Supreme Court in Electronic Corporation India (Supra), the Corporation is a distinct and different company then the State Government and it can frame its own rules, regulations and circulars. The policy of the Government does not bind it. When the Corporation framed its circular the same is in nature of administrative instructions or executive instructions in this behalf.

10. I am also of the view that whether to introduce the VRS or not is a question of policy of the Government as well as of the Corporation. The question of policy is essentially for the State or the Corporation to decide. Such policy depends upon number of circumstances and it is neither desirable nor possible to lay down as fixed

standards. In my view, this Court has very limited jurisdiction to consider the legality and validity of the said policy. In my view, it is neither desirable nor advisable for this Court to direct the Government or Corporation to adopt a particular policy which the Court deems fit proper in this behalf. I rely upon the judgments which have been cited by the learned Advocate General as well as advocate for the Corporation in this behalf. In my view, the Court cannot sit in judgment over the wisdom of the policy evolved by the Corporation. In my view, the Corporation is a sole repositories of the power to decide what policy should be pursued in relation to matters governing service condition of it's employees. There is no scope for interference by this Court in this behalf. In my view whether the original circular is good or whether the amendment in the circular takes away the rights which were existed in the original circular, these are the questions of policy concern. So in my view while resolving the validity of the policy or amendment in policy issues like which policy will apply and which policy will beneficial to the employee, this is the exercise which the administrator and the Corporation has to undertaken. In my view, the Government & Corporation have also power to change the policy. The executive power is not limited to frame a particular policy. It has untrammelled power to change, rechange, adjust and readjust the policy taking into account the relevant and germane considerations. In my view both Government and Corporation has taken into relevant consideration viz precarious financial position of the Corporation. It is entirely in the discretion of the Government & Corporation to decide how a policy of voluntary retirement should be shaped. In my view, therefore, all the decisions which have been cited by Shri S.N.Shelat, learned Advocate General and Mr.K.M.Patel, learned advocate for the Corporation, the ratio of the judgments are that the Court should not interfere with the policy matter.

10.1 I have considered the judgments cited by the learned Counsels for the petitioner also. However, those decisions are not applicable to the facts of the case. It has not been pointed out by the learned Counsels for the petitioner that within the class comprising of the employees of the Corporation, the Corporation has not followed its VRS scheme or has discriminated its employees in this case. The Corporation has implemented the policy evenly and there is no discrimination amongst similarly situated employees. Learned advocate for the petitioner has not been able to point out that there is discrimination in implementing its policy. As pointed

out earlier, in fact the petitioners have no right much less legal or fundamental right in connection with the implementation of the voluntary retirement scheme and therefore also this Court cannot issue any writ particularly writ of mandamus where the basis of the legal right is for the issuance of the writ of mandamus.

10.2 In my view the circular issued by the Corporation represent merely their understanding of the policy of the VRS. It is true that circulars are issued to the concerned employee but even so nothing prevent the Corporation from amending the said circular if situation so demand. The circular whether in favour or against the employees is nothing more than understanding in opinion expressed by the Corporation in the policy of VRS.

10.3 In my view, the Corporation has acted legally, validly and its interest of its employees and also interest of the State. It has been pointed out that the Corporation is facing precarious financial position and orders of BIFR shows that the Corporation is badly in need of money in this behalf. If the Corporation has to pay large sums of money to their employees as contended by the learned advocate for the employees, then the Corporation will have to bare unnecessary burden with additional amount. It has been contended that the Government will have to pay such large amount and therefore the Corporation should not contend that they are not liable to make payment. In the modern welfare of the State, even if the Government to pay the money, such money comes from the honest tax payers and therefore also it does not lie in the mouth of the employees to say that whatever reasons evenif the Corporation has no fund, the Government may have to pay the said amount to the employees. In my view, this is not a correct proposition and when the Corporation has decided and adopted a policy it is not a function of this Court to interfere with the said policy. In my view, the Corporation has acted legally and validly and I have found the policy of the Government is not arbitrary, or irrational and therefore the Court has no power and jurisdiction to interfere with the said policy.

11. In my view, the Circular/Administrative Instructions has not been enacted under statutory power and therefore such Administrative Instructions/Circular do not have the force of law. This means that it does no confer any right or it cannot provide any authority of law for depriving any one of his life, liberty or property. The Circular issued by the Corporation did not have any sanction of law, and since it was mere

administrative instructions, it could not be the basis of any action and therefore the petitioner cannot challenge the said contending that the action of the Corporation on basis of the Circular resulted in denial of their fundamental rights guaranteed under Article 14 of the Constitution of India.

12. The Circular provide flexibility to the Government in dealing with complex situations, which require quick changes in response to emerging situations. They also help the Government to try out certain provisions before converting them into rules.

12(A). In my view the Government/Corporation is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government/Corporation merely because it feels that another decision would have been fairer or wiser or more scientific or logical. In view of the peculiar facts and circumstances of the case, I am not persuade to hold that the action of the State/Corporation in issuing policy/circular of 1999 was unreasonable, illegal, arbitrary or actuated by extraneous considerations. In my view this Court cannot issue direction which would result in amendment of existing Government policy/circular. In my view, normally such decisions i.e. issuance of circular and amendment of the circular taken by the Government/Corporation after due care and consideration. In my view, the Corporation has taken a considered policy decision which is not in conflict with any law or is not malafide, it would not be in public interest to require the Court to go into and investigate those areas which are the function of the executive.

12(B) In my view the Circular in question is not contrary to Sec.23 of the Contract Act. The learned counsel for the petitioner has not been able to show that circular is forbidden by law or is of such nature if permitted it would defeat any provision of law. The Circular is voluntary and there is no injury to an employee or property of the employee, in fact circular gives larger benefit then the several provisions contained in the Industrial Disputes Act. The learned advocate for the petitioner has not been able to show how the same is immoral or opposed to public policy in fact object of the circular is lawful.

12(C) In my view Clause 8 of the said circular provides that once the employee opt for voluntary retirement

scheme he cannot be permitted to withdraw the same and not opposed to public policy.

13. In view of the aforesaid discussions, I am of the view that none of the contention raised by the petitioners requires to be considered to be accepted and all the submissions made on behalf of the Corporation as well as State are required to be accepted and, therefore, the petitioner cannot have any legal or fundamental rights to challenge the circular, and the impugned circular issued by the Corporation of 1999 is legal and valid and binding on all the employees of the Corporation. Hence, both the petitions stand dismissed with no order as to costs. Rule is discharged. Interim relief shall stand vacated.

(K.M. Mehta, J.)

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